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THE EARLY HISTORY OF EQUITY.

MR. W. T. BARBOUR'S Essay on the History of Contract in early English Equity,[1] which has been published this year in Oxford Studies in Social and Legal History, is one of the most, if not the most, valuable of the contributions to English Legal History which has yet appeared in that series. Mr. BARBOUR is to be congratulated on his first appearance in a field in which the harvest, though somewhat difficult to collect, is very abundant,—in a field in which the labourers are all too few. I think too that the Essay is important not only because it deals well and thoroughly with the early history of an important branch of the Chancellor's equitable jurisdiction, but also because it indicates the right manner in which the abundant material for this period in the early history of equity should be treated. But in order to explain this it is necessary to glance rapidly at the chief periods in the history of equity and their leading characteristics. We shall then be in a position to understand the method which Mr. BARBOUR has pursued, and the value of the results which the pursuit of this method has enabled him to attain.

Continuity is the characteristic feature of the history of the common law. An absence of continuity is the characteristic feature of the early history of our system of equity. No doubt the root idea of equity, the idea that law should be administered fairly and that hard cases should so far as possible be avoided, is common to many systems of law at all stages of their development;[2] and this root idea came very naturally to the mediaeval mind, which regarded the establishment of justice through or even in spite of the law as the ideal to be aimed at by all rulers and princes. In England the mediaeval history of the application of this ideal to the law passed through two distinct stages. There is the stage in which it was applied in and through the common law courts, and there is the stage in which it was applied in and through the Council and the Chancellor.

The first stage may almost be said to have been discovered during the last thirty years; and it is only within the last year or two that

[1] The History of Contract in Early English Equity, by W. T. Barbour, A.M., LL.B., B.Litt., Assistant Professor of Law in the University of Michigan, U. S. A.; Oxford Studies in Social and Legal History, Vol. IV, edited by Paul Vinogradoff, M.A., Hon. D.C.L., LL.D., Dr. Hist., Dr. Jur. Corpus Professor of Jurisprudence in the University of Oxford. Oxford, at the Clarendon Press, 1914.

[2] Cp. Pollock, The Transformation of Equity, Essays in Legal History, 287-289.

any detailed consideration has been devoted to it. HOLMES's paper on the origin of the Use; MAITLAND'S discoveries of the equitable character of the justice administered in the king's courts in the days of BRACTON, and of the continued existence of this characteristic in the Year Books of EDWARD II's reign; Mr. BOLLAND'S discovery of the equity administered by the Justices in Eyre through the machinery of an informal Bill addressed to them; and Dr. HAZELTINE'S able summary and analysis of all these recent authorities—have created a new chapter in the mediaeval history of English Law. But this stage in the history of equity ends in the course of the first half of the fourteenth century. In the latter half of the fourteenth and in the fifteenth centuries the common law tended to become a fixed and a rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of that royal discretion which was at the base of the equitable modification of the law. Equity therefore came to be exercised by the Chancellor and Council who were in close touch with the king, because through them the king exercised his executive and extraordinary judicial power.

This second stage in the history of Equity differs in three important respects from the preceding stage. In the first place its growth was caused, and its development was largely conditioned, by the rigidity which naturally became a marked characteristic of the common law, when it ceased to develope those equitable principles and ideas, which it possessed at an earlier period. The defective state of the common law both substantive and adjective, and the disturbed state of the country, which not only rendered its cumbersome procedure useless but even enabled litigants to abuse it to promote injustice, gave rise to a need for the growth of a set of equitable principles outside of and even opposed to the common law. In the second place, being thus developed outside the sphere of the common law and mainly by ecclesiastical Chancellors, its interference with the common law was more direct and avowed than it would have been if it had been developed in and through the common law courts. In the third place the theory upon which the equity of these ecclesiastical chancellors was based was somewhat different from the theory upon which the equity described by BRACTON and administered by the common lawyers of the thirteenth and early fourteenth centuries rested. As Professor VINOGRADOFF has pointed out,[3] the common lawyers of the thirteenth and early fourteenth

[3] Reason and Conscience in Sixteenth Century Jurisprudence. 24 Law Quarterly Review, 379.

centuries used equity in a wide sense and included under the term such ideas as justice and analogy. The ecclesiastical chancellors, on the other hand, based the equity which they administered upon reason and conscience. Conscience must decide how and when the injustice caused by the generality of rules of law is to be cured. It is, in fact, the executive agent in the work of applying to individual cases the dictates of the law of God and of reason upon which these ecclesiastical chancellors considered equity to depend.

The equitable jurisdiction of the Chancellor, then, was based on an application of the current ideas of the canonists of the fifteenth century regarding the moral government of the universe to the administration of the law of the state. The law of God or of nature or of reason must be obeyed; and these laws require, and, through the agency of conscience, enable abstract justice to be done in each individual case, even at the cost of dispensing (if necessary) with the law of the state. How far it could interfere with the law of the state was to be determined by drawing distinctions, in the light of this theory, between the various provisions of the laws which governed the state.[4] Naturally equity administered on these lines was "loose and liberal, large and vague." And the popularity of the equity administered by the Chancellor on these lines was so great that, in the latter part of the fifteenth and in the sixteenth centuries, we begin to see the growth of a separate and distinct court of Chancery, with its own staff of officials and its own peculiar procedure. Naturally this produced a growing friction between this new court and the common law courts; and the literature of the period[5] shows that these differences had become acute in the first quarter of the sixteenth century.

This second stage in the history of equity ends with the beginning of the Reformation in HENRY VIII's reign. One of the indirect results of that movement was the beginning of a third stage, in which the ecclesiastical Chancellors of the preceding period gradually gave place to English lawyers. Fortunately, however, the principles upon which the ecclesiastical chancellors had acted had been summarized and rendered intelligible to English lawyers by ST. GERMAN'S Dialogue between the Doctor and the Student. Of the importance of this Dialogue to the proper understanding of the equity administered by the ecclesiastical Chancellors Professor VINOGRADOFF has spoken authoritatively.[6] But the book has another,

[4] See Holdsworth, 28 Law Quarterly Review, 240-242.

[5] Holdsworth, Hist. Engl. Law, i. 236, 247.

[6] Reason and Conscience in Sixteenth Century Jurisprudence. 24 Law Quarterly Review, 374.

and perhaps from the point of view of results achieved, a more important aspect. It helped to secure a larger amount of continuity than would otherwise have been possible between the second period when equity was administered by the ecclesiastical chancellors, and the third period when it was administered by English lawyers. And though, from Professor VINOGRADOFF'S point of view, the original Latin version of the Dialogue is the most important, from our present point of view the English version must be regarded as having had by far the greatest influence. The reasons why the English version of the book was able thus to bridge the gap between these two periods were somewhat as follows:—

Firstly the English form of the Dialogue put into a popular and an intelligible form the current learning of the canonists as to fundamental legal conceptions, as to the nature and objects of law, and as to the different kinds of law and their respective functions. This enabled the author to explain in an equally intelligible way the canonist learning as to the necessity and reason for the existence of equity. ST. GERMAN'S popular exposition made this learning the basis and starting point of English equity. Secondly the date at which it appeared was extraordinarily opportune. It came just at the date when the ecclesiastical chancellors were giving place to chancellors of the new school. It therefore enabled this new school of chancellors to understand and apply the principles which their predecessors had laid down. It enabled them more easily to grasp the principles laid down in those Year Book cases which, as the literature of this period shows, were almost the only other authorities on the substantive rules of equity. Thirdly the popular form in which the canonist principles were expressed, and their detailed application to the rules of English law which the dialogue form rendered possible, facilitated the development of these principles on native lines. In fact ST. GERMAN did for the principles which he took from GERSON what BRACTON did for the principles which he took from AZO. Both writers adapted foreign principles to an English environment. In both cases there was a reception and a use of the foreign principles thus adapted, which helped on a native development of the law. But in neither case was there any reception in detail of foreign law.

The fact that English lawyers, educated at the Inns of Court, presided over the Chancery tended to keep the equity administered by the court of Chancery in close touch with the development of the common law, and to improve the relations between common law and equity. At any rate an open conflict was avoided. But the root of the earlier differences was still present, and, at the beginning

of the seventeenth century, the old conflict broke out with renewed vigour in the dispute between COKE and Lord ELLESMERE. JAMES I settled it in favour of the court of Chancery; with the result that from henceforth it was a court of equal and in some respects of superior authority to the courts of common law.

These developments introduce us to a fourth stage in the history of equity. Equity tended to become less a principle or a set of principles which assisted, or supplemented, or even set aside the law, in order that justice might be done in individual cases, and more a settled system of rules which supplemented the law in certain cases and in certain defined ways. We can see the beginnings of this change in the first half of the seventeenth century. But its progress was hindered by the victory of the Parliament, because Parliament suspected the equity administered by a Chancellor in intimate relations with the king.[7] Thus although in this period we can see the origins of some of our later equitable rules, they are, as yet, very rudimentary. We must wait till the latter half of the seventeenth century for marked progress in this process of transformation. It is not till then that the lineaments of our modern system of equity begin to emerge with any distinctness.

Mr. BARBOUR'S book deals exclusively with one topic in the second, and in some respects the most obscure, of the stages into which we have divided the history of equity. It is a most obscure stage for two reasons. In the first place, although the records of many thousand applications to the Chancellor are in the Record Office, comparatively few have as yet been printed. In the second place the miscellaneous character of these documents makes any principle of selection difficult. To publish them *in extenso* in chronological order would no doubt be useful; but it would produce a feeling of bewilderment in the mind of the student unless he could be furnished with some key to the labyrinth. Mr. BARBOUR has gone far to meet both these difficulties. He has published a good selection of these documents, and he has referred to many more; and, what is more to the point, he has furnished us with the key to the understanding of the documents which he has published. He has shown us clearly and in detail what were the defects of the common law of contract, and he has used his documents to show the manner in which the Chancellor was prepared to remedy them. He has described exactly and with abundant illustrations the nature of the pressure which led common law to extend the sphere of the action on the case. If

[7] Pollock, Essays on Legal History, 294-5; cp. Holdsworth, Hist. Engl. Law. i, 222, 250.

we could have a few more essays of this kind devoted to other branches of law they would shed great light not only upon the history of equity, but also upon the nature and causes of many developments in the common law of the later fourteenth and fifteenth centuries. We hope that in any future publication of early Equity cases the plan foreshadowed in this essay will be followed. At least there would be a principle of selection. And this gives some security that important cases will not be overlooked. To search a mass of material with one definite object in view is both easier and more satisfactory than to search it with several less definite objects. But it should always be borne in mind, in the making of these selections, that preference should, when possible, be given to cases in which a decree was made. No doubt the *ex parte* statements in Bills and Answers are useful illustrations in default of better evidence; but the litigants of this period never allowed the truth to stand in the way of the production of a picturesque effect.

Mr. BARBOUR'S statements of the rules of the mediaeval common law we have found to be both clear and accurate. The only point on which we think he is wrong is his opinion that the action of account did not lie as between partners.[8] But it is not an important point, because whether it lay or not, it is clear that the equity procedure was far more satisfactory. The most interesting questions raised by the book are firstly, What was the theory of contract held by the mediaeval Chancellors? and secondly, What influence has this theory had upon the future development of the law?

(1) The question as to the theory of contract held by the mediaeval Chancellors, really turns upon the nature of the test which they applied to distinguish between a mere agreement and a contract. But these early equity cases do not supply us with a clear explanation of the nature of this test. Apparently all that we can say is that the plaintiff must show that, in the circumstances, it was reasonable that the agreement should be enforced, and that it would be unconscientious if the defendant did not fulfil his undertaking. It is obvious that this is a vague test. It involves an enquiry into the circumstances under which the agreement was made. We must ask, What change has taken place in the position of the parties as

[8] At p. 56 n. 1, Fitzherbert's statement, F. N. B. 117 D, that account lay as between partners is questioned; but Y. B. 41 Ed. III, Hil. pl. 8 (P. 4) makes it clear that it lay where one man bailed to another money to trade with; the objection to the action in that case was that the trading had taken place in Brittany, but it did not prevail, and the plaintiff got judgment, Y. B. 41 Ed. III, Pasch. pl. 4; and cp. Y. B. 34 Hy. VI. Trin. pl. 4; and Crompton, Courts 49 b; it is true that partnership is not mentioned eo nomine in either case, but the case of receiving money to trade with would cover most cases of partnership.

the result of the agreement? What was the object of the agreement? Was it an object—such as charity or marriage—which it was a matter of public policy to further? Did the parties seriously intend to contract? The result is that, as Mr. BARBOUR says, "it is impossible to determine absolutely the ground upon which chancery proceeded." The Doctor and Student, however, makes it probable that the test to distinguish agreement from contract which the chancellors had at the back of their minds was derived from the canonist idea of *Causa*, which is the ancestor of the continental *Cause*. The Doctor is made to say:—[9]

> "First thou shalt understand that there is a promise that is called an Advow, and that is a promise made to God, and he that doth make such a vow upon a deliberate mind intending to perform it, is bound in conscience to do it, though it be only made in the heart without pronouncing of words; and of other promises made to man upon a certain consideration, if the promise be not against the law:—as if A promise to give B £20 because he hath made him such a house * * * I think him bound to keep his promise. But if his promise be so naked, that there is no manner of consideration why it should be made, then I think him not bound to perform it, for it is to suppose that there was some error in the making of the promise: but if such a promise be made to an University, to a city, to the church, to the clergy, or to poor men of such a place, and to the honour of God, or such other cause like, as for maintenance of learning, of the commonwealth, of the service of God, or in relief of poverty or such other, then I think that he is bound in conscience to perform it, though there be no consideration of worldly profit, that the grantor hath had or intended to have for it: and in all such promises it must be understood that he that made the promise intended to be bound by his promise, for else commonly after all Doctors he is not bound, unless he were bound to it before his promise. As if a man promise to give his father a gown that hath need of it to keep him from the cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before."

(2) What influence, then, has this theory had upon the future development of English law? It is clear that the Chancellor did what the common law did not do—he started from the basis that

[9] Doctor and Student Bk. II, c. 24.

an agreement, because it was an agreement, ought *prima facie* to be enforced. It may be that the ecclesiastical chancellors, starting from the broad premise that *laesio fidei* ought to be redressed, arrived very easily at this conclusion. This liberal idea was a most useful corrective to the very rigid ideas of the common lawyers. It is probable that it had a very large influence in inducing them to extend the sphere of assumpsit; and there cannot be much doubt but that the frequent allegations made by plaintiffs that they had changed their position on the faith of the making of the undertaking, helped the common lawyers to arrive at this test of the enforceability of an agreement.[10] But it is not probable that the canonist ideas had any more direct influence upon the theory of contract eventually worked out by the common law. The Student will have none of the Doctor's subtleties.[11] He says:—

> "Of the intent inward in the heart, man's law cannot judge, and that is one of the causes why the law of God is necessary (that is to say) to judge inward things, and if an action should lie in the case in the law Canon, then should the law Canon judge upon the inward intent of the heart, which cannot be as meseemeth. And therefore after divers that be learned in the laws of the realm, all promises shall be taken in this manner, that is to say, If he to whom the promise is made have a charge by reason of the promise, which he hath also performed: then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it."

The impulse to extend the sphere of the enforceable agreement came from the Chancery; but the technical method by which that extension was made was the gradual enlargement of the scope of a common law action. Hence the test of the enforceability of agreements came to be the sum of the conditions under which that action would lie. That is the essence of the doctrine of consideration. And, as the test of consideration, thus evolved by the common law, came to be the test eventually accepted by equity, the canonist theory ceased to affect directly either law or equity. Here as in other

[10] See Mr. Barbour's Essay pp. 118-9. He there says that in the majority of petitions relating to contracts for the sale of land which he has examined this allegation is made; but it is probable from the Doctor and Student that Mr. Barbour is right when he says that this was not a condition precedent for recovery, but only an "aggravating circumstance"; the Doctor states the wider canonist doctrine, the Student the doctrine of detriment incurred on the faith of the making of the undertaking worked out by the common lawyers.

[11] Doctor and Student. Bk. II, c. 24.

branches of the law, foreign influences inspired native developments, but they did not prevent these developments from being essentially native.

We do not mean to belittle the influence of the ideas suggested to the ecclesiastical chancellors by the canon law. That influence showed the common lawyers that it was necessary to enlarge their ideas as to the enforceability of agreements, and therefore set them to search for some test to distinguish between agreements which were enforceable and those which were not. From this point of view therefore it may be said that the ideas drawn from the canon law and the practice of the ecclesiastical chancellors were the greatest of the forces which inspired the common lawyers to create the most distinctive of all the features of the English law of contract—the doctrine of consideration. And the influence of these ideas and this practice did not stop here. Directly they influenced the growth of special varieties of contract. Indirectly, by inducing the common law to apply to other departments of law the flexible action on the case, they inspired many developments both in the law of property and in the law of tort. We hope that Mr. BARBOUR will write some more essays upon the treatment of these branches of law by the chancellors of the late fourteenth and fifteenth centuries; and that he will explain, in them, as clearly as he has explained in this essay, the nature of the defects from which these branches of the common law was then suffering, the principles upon which the chancellor was prepared to supply a remedy, and the effect which this action of the chancellor had in producing a reform and an expansion of the common law.

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